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No. 84-1389

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

CITY OF BURBANK, a Municipal Corporation of the State of California, and JIM RICHMAN,
Petitioners,

vs.

CINEVISION CORPORATION, a corporation,
Respondent.

RESPONDENT CINEVISION CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ALAN I. ROTHENBERG
JOHN W. COCHRANE
MANATT, PHELPS, ROTHENBERG & TUNNEY
11355 West Olympic Blvd.
Los Angeles, CA 90064
(213) 312-4000

Attorneys for Respondent Cinevision Corporation

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600.

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Did the Court of Appeals err in affirming the jury verdict that defendants/petitioners City of Burbank and city councilman Jim Richman violated the First Amendment and 42 U.S.C. § 1983 by banning proposed "rock music" concerts from Burbank's Starlight Bowl Amphitheater, where those proposed concerts were banned on the express grounds that the defendants arbitrarily feared that rock artists and rock music to be presented by respondent Cinevision Corporation might attract "antinuclear demonstrators," "predominantly black audiences," "homosexuals," or "misfits"?[1]

2. Where a municipality owns and maintains an outdoor amphitheater, "[t]he essential purpose and character of [which] has been the promotion of communication and expression for the benefit of the general citizenry in and surrounding Burbank,"[2] and granted respondent Cinevision Corporation the right to promote "live entertainment" — including rock music — at that amphitheater, did the Court of Appeals err in affirming the District Court's judgment that the amphitheater was, for the purposes of this case, a "public forum"[3] such that the municipality could not engage in arbitrary, content-based prohibitions against the presentation of live musical entertainment by Cinevision?

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[1]These are direct quotes from the record, as quoted in the Opinion of the Court of Appeals, *Cinevision Corp. v. City of Burbank, et al.*, 745 F.2d 560, 578 n.25 (9th Cir. 1984).

[2]First Amended Complaint ¶7; *admitted in* Answer ¶8.

[3]*See, e.g., Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983); *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975).

3. Did the Court of Appeals err in affirming the District Court's judgment that a municipal official who acts in bad faith and deprives a plaintiff of its civil rights while ostensibly "monitoring the performance of [a] contract"[4] between the municipality and the plaintiff is not entitled to absolute legislative immunity for those bad faith acts, but rather only qualified good faith immunity under *Scheuer v. Rhodes*, 416 U.S. 232, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974)?

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[4]This is the District Court's characterization of defendant Richman's conduct, R.Tr. 357-59. Counsel for Richman agreed that this evaluation was factually correct, stating that "I think it is a fair characterization." *Id.*

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RESPONDENT CINEVISION CORPORATION'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CORPORATE STATUS OF RESPONDENT

Respondent Cinevision Corporation is a California corporation with no parent, subsidiary or affiliate corporations in existence, either now or at the time of the events underlying this litigation.

COUNTERSTATEMENT OF THE CASE

In the words of Circuit Judge Sneed, concurring in the Court of Appeals' decision below, "the case before us is clearly not exquisitely complex." *Cinevision Corp. v. City of Burbank, et al.*, 745 F.2d 560, 582 (9th Cir. 1984) (Sneed, J., concurring). What this case involves is the actions of

the City of Burbank and Jim Richman, a then-councilman, in preventing Cinevision Corporation's continued presentation of musical concerts featuring artists who might play "rock and roll" music at Burbank's Starlight Bowl Amphitheater.

The jury unanimously found that the basis for defendants' acts was the defendants' dislike for rock and roll: the evidence before the jury established that the defendants banned acts for the stated reasons that those acts featured performers — or might attract an audience — with political views or lifestyles that were different from or displeased the defendants. As fully catalogued in the Court of Appeals' decision, Cinevision's proposed acts were banned amid expressions of concern that a band might "attract homosexuals", "appeal basically to blacks", "attract antinuclear demonstrators" or "dopers," or, bluntly put, appeal to fans of "hard rock" music. Having carefully reviewed the full record of the proceedings before the District Court, the appellate court concluded: "The record before us leaves little room for any argument by the City of Burbank that the City Council rejected the proposed groups on constitutionally permissible grounds." 745 F.2d at 577.

This is a case where the City of Burbank entered a contract, in 1975, which granted Cinevision the right to promote live musical entertainment at the Starlight Bowl Amphitheater through the 1979 summer concert season. For three years, Cinevision presented popular musical groups to the public at the 6,000 person Starlight Bowl, located in Stough Park in the hills above Burbank. It was the appearance of Councilman Jim Richman on the scene which commenced Cinevision's difficulties with the City, and which culminated in the 1979 concert bannings described in detail in the Court of Appeals' decision.

Cinevision filed suit before the United States District Court for the Central District of California, seeking redress for the violation of Cinevision's rights under the First Amendment. The jury was fully apprised of the fact that Cinevision's goal was, at all times, to present popular musical entertainment to the public at the Starlight Bowl. The jury further reviewed the evidence, including videotaped City Council sessions, establishing that the motivation behind the banning of Cinevision's proposed acts was an inchoate fear of what City Council members thought a "rock and roll artist" might sing or portray to those who came to a concert. And, while the Petition filed before this Court adverts to isolated segments of the record — segments obviously not given precedence by the jury — in an effort to support a claim that Council members were concerned about factors such as "nuisance" possibilities, the fact remains that the City Council disapproved acts even though the Burbank Police Department had recommended approval because no likelihood of a public disturbance was presented by those specific acts' past appearance records at other venues.

The jury not only found that Cinevision's First Amendment rights had been violated by both petitioners, but the jury further found that petitioner Richman had knowingly, oppressively and maliciously conducted himself in a manner designed to deprive Cinevision of those rights; the jury awarded punitive damages against Mr. Richman. Neither here nor before the Court of Appeals is any challenge raised to the propriety of the findings that petitioner Richman's conduct warranted the imposition of punitive damages; rather, Richman simply argues that the fact that he voted in an effort to cancel specific acts proposed by Cinevision should grant him absolute legislative immunity for those specific acts.

ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Summary of Argument

Rule 21.5 of the Rules of the Supreme Court of the United States provides:

> "The failure of a petitioner to present with accuracy, brevity, and clearness whatever is essential to a ready understanding of the points requiring consideration will be a sufficient reason for denying his petition."

It is unfortunate that, in the effort to attempt convince this Court to grant the present Petition for Writ of Certiorari, the petitioners/defendants have chosen to (1) misstate or distort the record in this case by presenting a factual recitation directly at odds with the jury's verdict — thus ignoring the settled rule that, for purposes of appellate review, this Court is obligated to review the facts of this case in a light most favorable to Cinevision, which prevailed in all respects before the jury;[5] (2) cite in the "Questions Presented" section of their Petition, *but nowhere mention or discuss*, two appellate decisions which they erroneously contend are somehow "in conflict" with the decision here in question; (3) completely ignore, and even refuse to cite, the controlling decisions of this Court, and numerous other appellate courts, which mandate the result reached in the District Court and in the Court of Appeals.

In a case which principally involves the issue of the application of the First Amendment to the proposed presentation of musical entertainment, the cases utterly ignored by the petitioners include *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65, 101 S.Ct. 2176, 2181, 68 L.Ed.2d 671

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[5] *E.g.*, *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 358-59, 82 S.Ct. 780, 782-83, 7 L.Ed.2d 798 (1962); *Tennant v. Peoria & Peking Union Ry. Co.*, 321 U.S. 29, 35, 64 S.Ct. 409, 412, 88 L.Ed. 520 (1944).

(1981), where this Court expressly held that "Entertainment, as well as political and ideological speech, is protected" by the First Amendment. Petitioners ignore and fail to cite *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975), where this Court affirmed the right of theater promoters to be free of content-related censorship; recognized that theater, which "usually is the acting out — or singing out — of the written word" is entitled to First Amendment protection; and held that plays cannot arbitrarily be banned from a municipally-owned auditorium absent a compelling justification. 420 U.S. at 557-58. Petitioners also ignore and fail to cite *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981), a "concert promoter" case in which this Court expressly refused to disturb the First Circuit's holding that "the first amendment . . . protects Fact Concerts' right to produce jazz concerts," *Fact Concerts, Inc. v. City of Newport*, 626 F.2d 1060, 1063 (1st Cir. 1980), *rem. on other grds.*, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981); or *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983), which expressly held that a municipality could not prevent a bar owner from promoting rock music at his bar in the absence of a "strong justification for thus repressing a form of 'speech'," 704 F.2d at 950; and *Tacynec v. City of Philadelphia*, 687 F.2d 793, 796 (3d Cir. 1982), *cert. denied*, 459 U.S. 1172, 103 S.Ct. 819, 74 L.Ed.2d 1016 (1983), which also held that proposed musical performances are entitled to First Amendment protections.

Petitioners similarly ignore both the facts of this case and the law established by this Court in their "public forum" argument, where they simply avoid recognition of the fact that this Court carefully has established three "levels" of analysis of public forum issues in *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37,

103 S.Ct. 948, 74 L.Ed.2d 794 (1983). Petitioners' refusal to differentiate among the types of public forums constitutes the basis for their present argument that the Starlight Bowl was not an *all-purpose* public forum — a position neither advocated by Cinevision nor adopted by any court at any point in this case.

ARGUMENT

A. Having Opened the Starlight Bowl Amphitheater for the Presentation of Musical Entertainment, Petitioners Could Not Arbitrarily Enforce Content-Related Bans Upon Constitutionally-Protected Expression at that Forum.

Petitioners' first substantive argument (Petition, pages 9-10) simply urges that the Starlight Bowl was not a "public forum." No recognition is paid the fact that this Court has given careful scrutiny to the characterization of government-owned property as a "public forum", and has instructed lower courts to acknowledge three distinct levels of protection afforded expressive activities on government property. *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983), establishes that public property can be deemed (1) an "all-purpose" forum, (2) "public property which the state has opened for use by the public as a place for expressive activity," or (3) public property "which is not by tradition or designation a forum for public communication." In the second category, this Court has classified cases such as *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), and *Southeastern Promotions, Limited v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975). *Perry, supra*, 460 U.S. at 45-46. The *Southeastern Promotions* case is remarkably similar to the present facts: There, the City of Chatanooga, Tennessee, had granted a theatrical promoter a contractual right to

present a play at a municipally-owned theater, and subsequently banned the performance of the proposed play for reasons attributable to the perceived content of that play. This Court affirmed the issuance of an injunction against that prior restraint of speech at a location deemed a public forum for purposes of the expression there in question.

The present case differs little, if any — indeed, in the present case Cinevision had already been present at the Starlight Bowl Amphitheater, for the purpose of presenting live musical entertainment, for over three years prior to the time that these defendants arbitrarily banned Cinevision's proposed acts. On this basis alone, the District Court and Court of Appeals were entirely correct in determining that the Starlight Bowl Amphitheater was a "public forum" at least to the extent necessary to prevent the defendants from engaging in arbitrary, content-based bannings of proposed entertainment.

The decision of the Court of Appeals regarding the "public forum" issue is, in all respects, entirely consistent with the decisions of this Court and of all circuit courts which have addressed similar questions.

B. The First Amendment Unquestionably Protects Presentation of Entertainment to the Public; This is Not a "Draft Card Burning Case" or "Park Sleeping Case".

There is no question in this case that Cinevision sought to promote rock and roll music at the Starlight Bowl. Petitioners themselves acknowledge that Cinevision "proposed to present nine different rock groups at the Bowl during the summer of 1979." (Petition, Page 4). Simply to so identify Cinevision's goal is to acknowledge the proposition that "rock groups" play "rock and roll," which is a known and popular entertainment form; a genre; a medium of communication and expression viewed by many in our society as a desirable and an enjoyable form of entertainment.

That the First Amendment applies to protect the presentation of musical entertainment is too clear to merit extensive discussion. This Court expressly has held that:

> "Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works fall within the First Amendment guarantee."

Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65, 101 S.Ct. 2176, 2181, 68 L.Ed.2d 671 (1981). This Court consistently has recognized the First Amendment rights of those who would present entertainment to the public, such as those who would distribute films, *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501, 72 S.Ct. 777, 780, 96 L.Ed. 1098 (1952); those who would promote theatrical plays, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975); those who would propose to present nude dancers as public entertainment, *Schad v. Borough of Mount Ephraim, supra;* and even those who would propose to present arguably "obscene" films and entertainment, *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). Applying these principles, the lower courts consistently have ruled that the presentation of musical expression is entitled to protection under the First Amendment, whether that music be rock and roll promoted by a bar owner, *Reed v. Village of Shorewood*, 704 F.2d 943 (7th Cir. 1983); jazz concerts presented by a concert promoter virtually identical to Cinevision, *Fact Concerts, Inc. v. City of Newport*, 626 F.2d 1060, 1063 (1st Cir. 1980), *rem. on other grds.*, 453 U.S. 247, 101 S.Ct. 2648, 69 L.Ed.2d 616 (1981); performance of a marching band, *Tacynec v. City of Philadelphia*, 687 F.2d 793, 796 (3d Cir. 1982), *cert. denied*, 459 U.S. 1172, 103 S.Ct. 819, 74 L.Ed. 2d 1016 (1983), or other proposed musical events. *Gold-*

stein v. Town of Nantucket, 477 F.Supp. 606, 608 (D.Mass. 1979).

Cinevision's goal at all times was the presentation of popular musical entertainment to the public at the Starlight Bowl.[6] In proposing to present entertainment at the Starlight Bowl, Cinevision did not purport to censor the content of the performers' acts. Rather, it was Cinevision's goal to permit the performers to perform the materials which made them popular as entertainers.

The protection afforded the presentation of entertainment by the First Amendment is indeed a necessary protection for, as this Court has long noted, "[w]hat is one man's amusement, teaches another's doctrine." *Joseph Burstyn, Inc. v. Wilson, supra*, 343 U.S. at 501, *quoting Winters v. New York*, 333 U.S. 507, 510, 68 S.Ct. 665, 667, 92 L.Ed. 840 (1948). Rock and roll music is, itself, in many ways a testimonial to the truth of this adage. One time "catch

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[6]This goal is clearly stated in one of the portions of the Reporter's Transcript which the petitioners have "elipsesed out" of their Appendix C to the Petition for Certiorari. At R.Tr. 199 (the elipses located at Page C-4 of Appendix C), the Transcript continues as follows:

> "Q: [by Defendants' Counsel] You didn't really care, did you?
>
> A: [by Mr. Berwick, President of Cinevision] I cared if anything would be wrong. I didn't want anything to be wrong for the people in the audience.
>
> Q: How do you mean, sir? What would they have to do to be wrong?
>
> A: We wanted our programs, and we were told that the programs were good shows and put on at places before. People enjoyed them and people crowded to see them; and, actually, if you had the opportunity to be there, you'd see six thousand kids just having a lot of fun. Nothing bad was happening. We were in control of what was happening."

phrases" in rock and roll songs now regularly find their way into the accepted parlance of American society — for example, President Ronald Reagan's recent comments describing his forecast for his second Term as President of the United States: "from here on, it's 'shake, rattle and roll' ". *All Ahead Full, Skipper Reagan Tells Crew,* Washington Post, Jan. 26, 1985, Section A, at p. 4. *See generally, What Pop Lyrics Say to Us Today,* New York Times, Feb. 24, 1985, Section II, at p. 1.

Petitioners' response to the law and facts is to ignore both. Specifically, without citation or reference to any of the cases discussed above, all relied upon by the Court of Appeals or the District Court, petitioners cite the "draft-card burning case" of *United States v. O'Brien,* 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), and the "sleeping in the park case" of *Clark v. Community for Creative Non-Violence,* ____ U.S. ____, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). These cases simply do not involve the presentation of entertainment to the public, and are neither controlling nor particularly relevant to the present action.

C. There is No Conflict Among the Circuits on any Issues Raised by Petitioners.

On the first page of the present Petition, petitioners assert that the decision of the Court of Appeals in this case is in conflict with recent decisions of the Third and Eighth Circuits, citing *Jarman v. Williams,* ____ F.2d ____ (No. 84-1337, 8th Cir., Jan. 21, 1985), and *American Future Systems, Inc. v. Pennsylvania State University,* ____ F.2d ____ (No. 83-3412, 3d Cir., Dec. 28, 1984). Astonishingly, petitioners nowhere substantiate this claim by even so much as a reference to those decisions in the body of the Petition. The fact is, neither decision is in any respect inconsistent with the decision of the Court of Appeals in the present case.

Jarman, for example, involved a parent group's effort to be given access to a school auditorium for the purpose of holding dances for their children. The court there affirmed the District Court's denial of relief, noting first that the school auditorium had not historically been used for the type of activity now proposed, and that the type of dancing proposed was not appropriate for First Amendment protection. In so holding, the court was careful to distinguish *Schad v. Borough of Mount Ephraim, supra*, recognizing that *Schad* does provide protection for "dancing before audiences as a performance or an art form," ____ F.2d at ____ — which was not an issue in the *Jarman* case. In the present case, of course, Cinevision both proposed the presentation of concerts "before audiences as a performance or an art form," *and* proposed only to continue the same type of use of the Starlight Bowl as had previously and consistently been undertaken.

American Future Systems involved the regulation of purely commercial speech — "Tupperware" sales — at a public university. The court there was very careful to avoid even engaging in standard "public forum" analysis, recognizing that the case involved pure commercial speech involving the proposal of a straightforward commercial transaction, which the Third Circuit felt may be subject to different standards than artistic or expressive performances as involved in the present case. *American Future Systems*, then, is completely inapplicable to the facts of the present case.

D. Petitioner Richman's Absolute Immunity Argument is Both Legally and Factually Without Substance.

The lower courts in this case properly held that petitioner Jim Richman was, at best, entitled only to qualified good faith immunity from liability for his actions underlying this litigation. Furthermore, it is significant that the jury

expressly found — and Richman did not contest on appeal — that Richman's conduct was sufficiently egregious to warrant the imposition of punitive damages against Richman in his individual capacity. 42 U.S.C. §1983; *Smith v. Wade*, 461 U.S. 30, 103 S.Ct. 1625, 75 L.Ed.2d 632 (1983); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269, 101 S.Ct. 2748, 2761, 69 L.Ed.2d 616 (1981). Obviously, the jury did not find petitioner Richman was entitled to be exonerated from liability for compensatory damages on the basis of conduct which could be characterized as being in "good faith."

The only issue presented by Richman is the claim that, because he *voted* to disapprove specific acts proposed by Cinevision pursuant to the terms of its contract with the City, he should be absolutely immune from liability. Such is not, and has never been, the test for determining when a public official is entitled to invoke absolute legislative immunity. As thoroughly reviewed in *Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), this Court has been hesitant to recognize immunities from liability for violations of civil rights, and has done so only in those circumstances in which an exemption from liability was well established at the time of the adoption of the Civil Rights Act.

More specifically, this Court has never adopted, as a test for the applicability of absolute legislative immunity, a standard that any act accomplished by a vote necessarily must be "legislative." To the contrary, this Court has long recognized that "[t]he essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct," *Yakus v. United States*, 321 U.S. 414, 424, 64 S.Ct. 660, 667, 88 L.Ed. 834 (1944) — *not* simply the oversight of a specific and preexisting contractual relationship.

This Court's subsequent cases have emphasized that it is the nature of the action, and not simply the status of the actor or the method of accomplishing the act, which determines the characterization of an act as "legislative" or "administrative" — and thus determines the applicability of absolute legislative immunity as opposed to qualified executive immunity. *See, e.g., Doe v. McMillan*, 412 U.S. 306, 313, 93 S.Ct. 2018, 2025, 36 L.Ed.2d 912 (1973); *INS v. Chadha*, 462 U.S. 919, 103 S.Ct. 2764, 2784, 77 L.Ed.2d 317 (1983); *see also, Developments in the Law: Zoning*, 91 Harv.L.Rev. 1427, 1510-11 (1978).

In the present case, there is no question that petitioner Richman was serving to monitor the performance of the contract between the City of Burbank and Cinevision. Richman's counsel conceded this fact in colloquy with the District Court, as quoted in the Counterstatement of Questions Presented, page ii and footnote 4, *supra*. Under such circumstances, there is no basis for arguing that Richman's specific decisions to reject the concerts should be deemed "legislative acts" when, in truth and in fact, those acts were simply performed in furtherance of the administration of the contract.[7]

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[7]Richman's final argument, to the effect that failing to provide absolute legislative immunity might place city officials at risk for large judgments, is easily met: all a city official need do in order to obtain immunity for official action is act in good faith. Not only did this petitioner fail to act in good faith, but he actually conducted a malicious attack upon Cinevision, which the jury rebuked by assessing punitive damages against Mr. Richman in his individual capacity — a finding disputed neither before this Court nor before the Court of Appeals. *See, City of Newport v. Facts Concerts, Inc., supra*, 453 U.S. at 269 (awarding punitive damages against defendant public official is appropriate to deter other officials from engaging in similarly outrageous conduct).

CONCLUSION

There is nothing novel, there is nothing conflicting, and there is nothing legally significant presented by the Petition for Certiorari presently before this Court. The decision of the Court of Appeals here at issue is, in all respects, correct.

It is respectfully submitted that the Petition for the Issuance of a Writ of Certiorari should be denied.

DATED: March 29, 1985.

Respectfully submitted,

ALAN I. ROTHENBERG
JOHN W. COCHRANE
MANATT, PHELPS, ROTHENBERG & TUNNEY

Attorneys for Respondent Cinevision Corporation